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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

VICTOR CHIRINO, Plaintiff and Appellant, v. COUNTY OF SAN BERNARDINO et al., Defendants and Respondents.	E062914 (Super.Ct.No. CIVRS1307251) OPINION

APPEAL from the Superior Court of San Bernardino County. Joseph R. Brisco, Judge. Affirmed.

Victor Chirino, in pro. per., for Plaintiff and Appellant.

Jean-Rene Basle, County Counsel, and Adam L. Miederhoff, Deputy County Counsel, for Defendants and Respondents.

Plaintiff and appellant Victor Chirino appeals from a judgment of dismissal with prejudice entered after the defendants' demurrers[1] to plaintiff's first amended complaint were granted without leave to amend, based on the trial court's ruling that the first amended complaint was time-barred. The issue of untimeliness was conclusively demonstrated by the facts alleged in the first amended complaint and by facts judicially noticed. We will affirm the judgment.

FACTUAL AND PROCEDURAL HISTORY

The lawsuit arose from two incidents that occurred in February 2011. On February 13, 2011, San Bernardino County Sheriff's deputies responded to a call concerning domestic violence at plaintiff's home in Rancho Cucamonga. Plaintiff was arrested and charged with one count of felony infliction of corporal injury on a spouse or cohabitant, pursuant to Penal Code section 273.5, subdivision (a). On February 13 or 14, 2011, plaintiff was searched by deputies at the West Valley Detention Center. He was found to be in possession of drugs and was charged with unauthorized possession of a controlled substance in a prison or jail, pursuant to Penal Code section 4573.6, subdivision (a). The complaint and the first amended complaint alleged that deputies

[1] Defendants, the County of San Bernardino, also sued as Arrowhead Regional Medical Center and the City of Rancho Cucamonga, jointly filed a demurrer to the first amended complaint; defendants Max Kunzman, Christopher Kelley and Timothy Nichols jointly filed a demurrer to the first amended complaint; and defendant Matthew McAllister filed a demurrer to the first amended complaint. All three demurrers raised identical contentions. The record on appeal contains the notice of ruling on only McAllister's demurrer. The register of actions shows that all three demurrers were sustained for the same reason, i.e., that the first amended complaint was time-barred.

unlawfully inflicted personal injuries on him during both incidents. The amended complaint also alleged false imprisonment and other torts not involving physical injuries.

Plaintiff filed a tort claim with the County of San Bernardino on August 24, 2011. The county accepted the claim as timely, but denied it. The notice of rejection included the required language (see Gov. Code, § 913, subd. (b).), informing plaintiff that he had six months from the date of rejection to file a lawsuit.

Plaintiff filed his original complaint on September 6, 2011, naming the San Bernardino County Sheriff's Department and the West Valley Detention Center. The County of San Bernardino appeared on behalf of the sheriff's department and the West Valley Detention Center, and filed a demurrer arguing that because criminal charges arising from the incidents alleged in the complaint were pending, the lawsuit was

precluded by Government Code section 945.3.[2] The demurrer was sustained without leave to amend, and the complaint was dismissed without prejudice to allow plaintiff to file a new complaint once the criminal action was resolved.

On October 19, 2012, the criminal charges stemming from the two incidents were resolved with plaintiff's plea of nolo contendere to one count of violation of Penal Code section 368, subdivision (b)(1), as part of a plea bargain that apparently included dismissal of the charges of spousal abuse and possession of contraband in jail.[3] Plaintiff was sentenced to a term of four years in state prison.

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[2] Government Code section 945.3 provides: "No person charged by indictment, information, complaint, or other accusatory pleading charging a criminal offense may bring a civil action for money or damages against a peace officer or the public entity employing a peace officer based upon conduct of the peace officer relating to the offense for which the accused is charged, including an act or omission in investigating or reporting the offense or arresting or detaining the accused, while the charges against the accused are pending before a superior court. [¶] "Any applicable statute of limitations for filing and prosecuting these actions shall be tolled during the period that the charges are pending before a superior court. [¶] "For the purposes of this section, charges pending before a superior court do not include appeals or criminal proceedings diverted pursuant to Chapter 2.5 (commencing with Section 1000), Chapter 2.6 (commencing with Section 1000.6), Chapter 2.7 (commencing with Section 1001), Chapter 2.8 (commencing with Section 1001.20), or Chapter 2.9 (commencing with Section 1001.50) of Title 6 of Part 2 of the Penal Code. [¶] "Nothing in this section shall prohibit the filing of a claim with the board of a public entity, and this section shall not extend the time within which a claim is required to be presented pursuant to Section 911.2."

[3] The record does not expressly state that the spousal abuse charge was dismissed. That case, Superior Court of San Bernardino County case No. FWV1103253, was consolidated with case No. FWV1100894, which included the charge of violation of Penal Code section 368, subdivision (b)(1), to which plaintiff pleaded. Case No. FWV1101296, which involved the charge of possession of contraband in jail, was also consolidated with case No. FWV1100894 and dismissed as part of the plea bargain in case No. FWV1100894. Plaintiff appears to concede, however, that all of the pending criminal charges were disposed on October 19, 2012.

On October 16, 2013, plaintiff filed the original complaint in this action. He filed a first amended complaint on July 29, 2014. Demurrers were filed by all defendants. The court sustained the demurrers without leave to amend, based on the court's finding that the complaint was time-barred, and a judgment of dismissal with prejudice was entered in favor of all defendants on February 10, 2015.

Plaintiff filed a timely notice of appeal.

LEGAL ANALYSIS

The Demurrer Was Properly Sustained Without Leave to Amend

Standard of Review

"In reviewing the sufficiency of a complaint against a general demurrer, we are guided by long-settled rules. 'We treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law. [Citation.] We also consider matters which may be judicially noticed.' [Citation.] Further, we give the complaint a reasonable interpretation, reading it as a whole and its parts in their context. [Citation.] When a demurrer is sustained, we determine whether the complaint states facts sufficient to constitute a cause of action. [Citation.] And when it is sustained without leave to amend, we decide whether there is a reasonable possibility that the defect can be cured by amendment: if it can be, the trial court has abused its discretion and we reverse; if not, there has been no abuse of discretion and we affirm. [Citations.] The burden of proving such reasonable possibility is squarely on the plaintiff." (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.)

Plaintiff's Contentions

In the argument section of his opening brief, plaintiff makes two arguments: (1) that the trial court committed prejudicial error in not allowing him to file evidence necessary to prove his case, and (2) that the trial court erroneously refused to instruct opposing counsel properly, leading to improper rulings and orders. As to the first argument, he does not specify what evidence he sought to file, nor does he cite to any portion of the record that shows that evidence he attempted to file was rejected. As to the second argument, plaintiff does not specify any order he believes the court should have made.

Judgments are presumed to be correct. (*Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1140-1141.) Accordingly, the appellant has the burden of overcoming this presumption by affirmatively showing error, both by producing an adequate record to establish that an error was made and by demonstrating that the error was prejudicial. (*Ibid.*; *In re Marriage of McLaughlin* (2000) 82 Cal.App.4th 327, 337.) As to these two arguments, plaintiff has not met his burden.

In the introduction section of his brief, plaintiff also contends that he was not allowed to argue his case during the hearing on the demurrer. However, because there is no reporter's transcript of the hearing, plaintiff has not met his burden of showing error. (*Ketchum v. Moses, supra,* 24 Cal.4th at pp. 1140-1141.)

Plaintiff also contends, in a couple of lines in the introduction section of his opening brief, that the demurrers were improperly sustained because his complaint was not time-barred. He does not develop the argument in his opening brief, but does so in

his reply brief, in response to the defendants' arguments. We would not ordinarily address a purported contention on appeal that is merely mentioned briefly in the introduction to the opening brief. We may disregard any argument that is not developed in the opening brief and supported by argument and by citation to authority and to the record on appeal. (*Duarte v. Chino Community Hospital* (1999) 72 Cal.App.4th 849, 856; *Paterno v. State of California* (1999) 74 Cal.App.4th 68, 105-106.) Nevertheless, because this is the central issue in this case and has been thoroughly addressed by the defendants, we will exercise our discretion and address the issue.

The Court Correctly Determined That the Complaint Was Time-Barred

The Government Claims Act (Gov. Code, § 810 et seq.; see *City of Stockton v. Superior Court* (2007) 42 Cal.4th 730, 746 [re name of act])[4] provides that all claims for money or damages against local public entities must be presented in accordance with the act, with certain exceptions that do not apply in this case. (§ 905.) Pursuant to section 911.2, claims for death or injury to a person against a public entity or public employee must be presented within six months after accrual of the cause of action. A lawsuit against the public entity or employee must be commenced within six months after service of the rejection of the claim. (§ 945.6.) When the claim involves an alleged injury by a peace officer, the second six-month period is tolled while any criminal charges arising out of the incident are pending against the claimant. (§ 945.3.) Criminal

[4] All further statutory citations refer to the Government Code unless another code is specified.

charges are pending, for purposes of section 945.3, until the date of judgment and sentence. (*McAlpine v. Superior Court* (1989) 209 Cal.App.3d 1, 5-9.)

The court records of which the trial court took judicial notice show that plaintiff was sentenced on October 19, 2012, on one count arising out of the incident. The other counts were dismissed. Accordingly, the date by which the complaint was required to be filed was April 19, 2013. Plaintiff did not file the complaint until October 16, 2013.

Plaintiff appears to contend that the correct statute of limitations is Code of Civil Procedure section 340, which provides a one-year statute of limitations for actions involving claims for false imprisonment, libel and slander, among others. (Code Civ. Proc., § 340, subd. (c).) However, it is well established that suits against a public entity or public employees are governed by the statute of limitations provided in the Government Code, not the statute of limitations that applies to private defendants. (*Moore v. Twomey* (2004) 120 Cal.App.4th 910, 913.) Code of Civil Procedure section 342 makes this abundantly clear: "An action against a public entity upon a cause of action for which a claim is required to be presented in accordance with Chapter 1 (commencing with Section 900) and Chapter 2 (commencing with Section 910) of Part 3 of Division 3.6 of Title 1 of the Government Code must be commenced within the time provided in Section 945.6 of the Government Code." The same reasoning applies to plaintiff's contention that the three-year statute of limitation provided for in Code of Civil Procedure section 340.5 for medical malpractice applies to his claims against Arrowhead Regional Medical Center.

Plaintiff understands section 911.2, subdivision (a), to apply the six-month claim presentation requirement only to physical personal injuries and contends that he had a year to pursue claims for false imprisonment and other torts not involving physical injuries. However, for purposes of the Government Claims Act, "injury" is defined as "death, injury to a person, damage to or loss of property, *or any other injury that a person may suffer to his person, reputation, character, feelings or estate*, of such nature that it would be actionable if inflicted by a private person." (§ 810.8.) Claims "relating to any other cause of action," which are subject to a one-year claims presentation period, as set forth in section 911.2, include actions in equity and actions based upon contract. (See, e.g., *Baillargeon v. Department of Water & Power* (1977) 69 Cal.App.3d 670, 681-682; see also *Voth v. Wasco Public Util. Dist.* (1976) 56 Cal.App.3d 353, 356.) In any event, the issue here is not whether plaintiff submitted his claim to the county within the applicable period provided for in section 911.2, but whether he filed his complaint within the applicable period following rejection of his claim.

Plaintiff next argues that the limitations period was tolled not only when the charges arising from the incidents were pending, but also for all periods during which he was in state prison. He bases this contention on section 945.6, subdivision (b), which provides: "When a person is unable to commence a suit on a cause of action described in subdivision (a) within the time prescribed in that subdivision because he has been sentenced to imprisonment in a state prison, the time limit for the commencement of such suit is extended to six months after the date that the civil right to commence such action is restored to such person, except that the time shall not be extended if the public entity

establishes that the plaintiff failed to make a reasonable effort to commence the suit, or to obtain a restoration of his civil right to do so, before the expiration of the time prescribed in subdivision (a)."

In *Moore v. Twomey, supra,* 120 Cal.App.4th 910, the court held that subdivision (b) of section 945.6 has been repealed by implication. The court explained that subdivision (b) is "[v]irtually unchanged since 1965," and that its tolling provision reflects the fact that "prisoners did not then retain the right to initiate civil actions although they could apply for a limited restoration of civil rights. (Cal. Law Revision Com. com., Deering's Ann. Gov. Code (1982 ed.) foll. § 945.6, p. 496; [citation].) Although Penal Code section 2601 was added in 1975 to provide that prisoners retain the right to initiate civil actions (Stats. 1975, ch. 1175, § 3, pp. 2897-2898; see Pen. Code, § 2601, subd. (d)), Government Code section 945.6, subdivision (b)'s extension of the limitations period to six months after 'the civil right to commence such action is *restored* to' the prisoner (italics added) still assumes a prisoner is unable to commence a government tort claims action because of his imprisonment. As a result, subdivision (b) appears to lack any continuing vitality. (Cf. Civ. Code, § 3510 ['When the reason for a rule ceases, so should the rule itself'].)" (*Moore v. Twomey,* at p. 914, fn. 2.) We agree that subdivision (b) no longer serves the purpose for which it was enacted.

Plaintiff also contends that Code of Civil Procedure section 352.1, subdivision (a), requires tolling of the statute of limitations during periods in which he was incarcerated. That statute provides: "If a person entitled to bring an action, mentioned in Chapter 3 (commencing with Section 335), is, at the time the cause of action accrued, imprisoned

on a criminal charge, or in execution under the sentence of a criminal court for a term less than for life, the time of that disability is not a part of the time limited for the commencement of the action, not to exceed two years." (Code Civ. Proc., § 352.1, subd. (a).) However, subdivision (b) specifically exempts actions subject to the Government Claims Act: "This section does not apply to an action against a public entity or public employee upon a cause of action for which a claim is required to be presented in accordance with Chapter 1 (commencing with Section 900) or Chapter 2 (commencing with Section 910) of Part 3, or Chapter 3 (commencing with Section 950) of Part 4, of Division 3.6 of Title 1 of the Government Code. This subdivision shall not apply to any claim presented to a public entity prior to January 1, 1971." (Code Civ. Proc., § 352.1, subd. (b).) Accordingly, his argument fails.

DISPOSITION

The judgment is affirmed. The parties shall bear their own costs on appeal.

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McKINSTER
J.

We concur:

RAMIREZ
P. J.

CODRINGTON
J.